PUBLIC BANK BHD

v.

LEE KIN MIO & ANOR

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: 1-24-457-2003]
6 JANUARY 2006

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Application by defendants to set aside order for sale of land granted to plaintiff after failure of defendants to attend adjourned hearing - Whether there were grounds for setting aside - Whether defendants properly served with notice of adjourned hearing - Whether plaintiff's affidavits in support provided necessary statutory particulars - Rules of the High Court 1980, O. 83 rr. 2(4), 3(3), (6), (7)*

LAND LAW: *Charge - Order for sale - Application by defendants to set aside order for sale of land granted to plaintiff after failure of defendants to attend adjourned hearing - Whether there were grounds for setting aside - Whether defendants properly served with notice of adjourned hearing - Whether plaintiff's affidavits in support provided necessary statutory particulars - Rules of the High Court 1980, O. 83 rr. 2(4), 3(3), (6), (7)*

This was an application by the defendants by way of summons in chambers for an order, *inter alia*, that the order for sale granted by this court on 26 November 2004 be set aside and that all proceedings be stayed. The plaintiff had filed an originating summons against the defendants for an order for the sale of certain land. After the originating summons had been served on both the defendants at the first defendant's address, both the defendants effected a partial repayment of RM25,000 towards their account with the plaintiff, with a view to an amicable settlement by way of undertaking to effect payment of further instalments. As the matter was pending the aforesaid settlement, hearing of the originating summons was adjourned to 26 November 2004 and notice of the hearing was served on both the defendants by way of AR registered post. The defendants failed to attend the hearing and an order for sale was made in respect of the land. The defendants contended that the order ought to be set aside on the grounds that: (i) the notice of the appointment for the adjourned hearing was served at the first

A defendant's address, thereby failing to comply with O. 83 r. 2(4) of the Rules of the High Court 1980 ('RHC'); and (ii) the plaintiff's affidavits in support had failed to comply with O. 83 r. 3(3), (6) and (7) of the RHC in relation to the particulars thereunder ('the statutory particulars'), and the interest claimed by B the plaintiff was not in accordance with the charge.

Held (dismissing the application):

(1) The notice of the adjourned hearing, as in the case of the C notice of the original hearing, had been served on both the defendants on 23 November 2004 at the first defendant's address, as both the defendants were relatives. Pursuant to the notice of the original hearing, both the defendants had taken substantive steps to effect an amicable settlement with D the plaintiff by way of the partial repayment of the sum of RM25,000 with an undertaking to effect payment of further instalments, upon which the defendants had obviously defaulted. They could not now be heard to say that while they were aware of the notice of the original hearing, they E were however unaware of the notice of the adjourned hearing. Hence, there had been no breach of the fundamental rule of natural justice *ie*, *audi alteram partem*. The facts also proved that the plaintiff had fulfilled the requirement of serving the notice of the adjourned hearing on the defendants not less F than two clear days before the day fixed for the said hearing. Thus, it was clear that the plaintiff had complied with O. 83 r. 2(4) of the RHC. (paras 15, 16, 17, 18 & 19)

(2) On the facts, the plaintiff's certificate of indebtedness had special legal implications because the defendants had expressly G agreed *vide* cl. 66 of the annexure to the charge that such certificates should be binding and conclusive evidence against the defendants as chargors for whatever purpose, including in a court of law. Indeed, it could not be otherwise since the defendants had not, by their affidavit, averred anything to the H contrary at all. There could be no doubt that the plaintiff had put the correct amount before the court. The defendants had not shown any iota of prejudice at all. In the circumstances, the court had the power to dispense with some omissions to fulfil the rules to the letter. The defendants had at all times I been acutely aware of the undisputed factual background including the outstanding sum and the interest as stated in the

plaintiff's affidavits which had provided most of the essential statutory particulars, thereby occasioning no prejudice nor any substantial miscarriage of justice to the defendants. (paras 37, 38, 39 & 41)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kimden Housing Development Sdn Bhd [1993] 1 CLJ 487 HC ***(refd)***

Bank Bumiputra Malaysia Berhad (Shah Alam) v. Wee Chye Luan & Anor [2001] 1 AMR 700 ***(refd)***

Bank Pertanian Malaysia v. Zainal Abidin Kassim & Anor [1995] 2 MLJ 537 ***(refd)***

Bank Simpanan Nasional v. Abdul Mutalib Mohd Salleh [2005] 7 CLJ 1 HC ***(refd)***

Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan [2002] 3 CLJ 686 HC ***(refd)***

Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd [2003] 3 CLJ 532 CA ***(refd)***

Citibank NA v. Ibrahim Othman [1994] 1 MLJ 608 ***(refd)***

Citibank v. Ooi Boon Leong [1981] 1 MLJ 282 ***(refd)***

Diamond Peak Sdn Bhd v. United Merchant Finance [2003] 2 CLJ 8 HC ***(refd)***

Feedmeal Malaysia Sdn Bhd v. Teh Cho Yeow & Ors [2003] 7 CLJ 11 HC ***(refd)***

Hong Kong Bank (M) v. William Tan Enterprise Sdn Bhd [1999] 3 MLJ 293 ***(refd)***

Malayan Banking Berhad v. Dagang Bina Sdn Bhd [1991] 3 CLJ 1739; [1991] 1 CLJ 678 HC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC ***(refd)***

Megnaway Enterprise Sdn Bhd v. Soon Lian Hock [2003] 5 CLJ 103 HC ***(refd)***

Mokhtar Amin v. Mohamed Mokhtar Omar [2001] 4 CLJ 489 CA ***(refd)***

Muniandy Thamba Kaundan & Anor v. D & C Bank Bhd & Anor [1996] 2 CLJ 586 FC ***(refd)***

Overseas Union Bank (M) Bhd v. L & L Properties Sdn Bhd [1999] 3 CLJ 47 HC ***(refd)***

Pengkalen Concrete Sdn Bhd v. Chow Mooi (Guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor [2003] 6 CLJ 326 HC ***(refd)***

R v. Immigration Tribunal ex p Jeyeanthan [1999] 3 All ER 231 ***(refd)***

Terrance Simon Marbeck v. Kerajaan Malaysia [2003] 6 CLJ 120 HC ***(refd)***

Legislation referred to:

Interpretation Acts 1948 and 1967, s. 12

Rules of the High Court 1980, O. 1A, O. 2 r. 3, O. 3 r. 2(3), O. 10 r. 1, O. 83 rr. 1(1)(a), (b), (c), 2(3), (4), 3(3), (6), (7)

A *For the plaintiff - Ramani Krishnan; M/s Sabarudin Othman & Ho*
For the defendants - Sailaja Ramakrishnan; M/s Sekar, S Ramakrishnan & Partners

Reported by Suresh Nathan

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JUDGMENT

Low Hop Bing J:

C **Application**

[1] This is the defendants' application by way of summons in chambers in encl. (17) for an order, *inter alia*, that the order for sale granted by this court on 26 November 2004 be set aside and
D that all proceedings thereto be stayed.

Factual Background

[2] The plaintiff had on 25 October 2003 filed originating summons in encl. (1) against the defendants for an order for sale
E of the land held under PT 476 HS(D) 2045 in the mukim of Sungai Baru Ilir, district of Alor Gajah ("the land").

[3] After service of the originating summons on both the defendants at the first defendant's address, both the defendants
F had in March 2004 effected a partial repayment of RM25,000 towards their account with the plaintiff, with a view to an amicable settlement by way of undertaking to effect payment of further instalments.

G **[4]** The defendants had filed no affidavit in objecting to the plaintiff's originating summons.

[5] On the original hearing date, 12 May 2004, the hearing was adjourned as on that day I had to attend a meeting at the Legal Profession Qualifying Board in connection with the Certificate in
H Legal Practice examination. The court has rescheduled the hearing date to 12 August 2004 and had by notice addressed to, *inter alia*, both the defendants, informing them of the new hearing date.

[6] As the matter was pending the aforesaid settlement, hearing
I of the originating summons was adjourned to 26 November 2004; and notice of hearing was served on both the defendants by way of AR registered post.

[7] On 26 November 2004 which was the adjourned date of hearing, the defendants were not present and so an order for sale was made in respect of the land.

Service Of Appointment Of Hearing

[8] Miss Sailaja Ramakrishnan, learned counsel for the defendants, submitted that the notice of appointment of hearing on 12 May 2004 has been served on both the defendants on 10 January 2004 at the first defendant's address at No. 73, Paya Mengkuang, 78300 Masjid Tanah, Melaka, ("first defendant's address") although the said notice contains the second defendant's address for service at No. 29, Paya Mengkuang 78300 Masjid Tanah Melaka. She added that the letter informing the defendants of the new date of hearing on 26 November 2004 was *vide* notice dated 23 November 2004 which was also served at the first defendant's address, thereby failing to comply with O. 83 r. 2(4) of the Rules of the High Court 1980. The following authorities were referred to:

1. *Asia Commercial Finance (M) Bhd v. Kimden Housing Development Sdn Bhd* [1993] 1 CLJ 487 HC;

2. *Muniandy a/l Thamba Kaundan & Anor v. D & C Bank Bhd & Anor* [1996] 2 CLJ 586 FC; and

3. *Bank Bumiputra Malaysia Berhad (Shah Alam) v. Wee Chye Luan & Anor* [2001] 1 AMR 700 HC.

[9] Plaintiff's learned counsel Miss Ramani Krishnan stated that although the notice of appointment of hearing has been served on the first defendant's address on 10 January 2004, the second defendant was nevertheless aware of the date of hearing on 12 May 2004 and the adjourned date of hearing on 26 November 2004 as both the defendants are relatives who had in March 2004 effected a partial repayment of RM25,000 for purposes of an amicable settlement, adding that the plaintiff has complied with O. 83 r. 2(4).

[10] In my judgment, a good starting point is to refer to O. 83 r. 2(4) which reads:

A O. 83 r. 2

(4) Where the hearing is adjourned, then, subject to any directions given by the Court, the plaintiff must serve notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended to be used at that hearing, on the
B defendant not less than 2 clear days before the day fixed for the hearing.

[11] Order 83 r. 2(4) was considered by James Foong J (now JCA) in *Kimden Housing Development Sdn Bhd, supra,* where the
C plaintiff had failed to inform the defendants of the new hearing date, and so it was held that O. 83 r. 2(4) has not been complied with.

[12] Another case in which O. 83 r. 2(4) was considered is
D *Muniandy, supra*, where the defendants had not been served with a notice of the adjourned hearing under that order and rule. The first instance judge held that failure to serve the notice was an irregularity. The Federal Court speaking through Edgar Joseph Jr FCJ (as he then was) allowed the appeal by the defendants, held,
E *inter alia*, as follows:

1. O. 83 r. 2(4) has a common law content ie, a statutory enunciation of the fundamental rule of natural justice as expressed in the Latin *maxim audi alteram partem* (hear the other side) so that the obligation to serve notice of the
F adjourned hearing remained even if O. 83 r. 2(4) did not apply;

2. Merely "sending" a notice without any proof of posting the notice is a far cry from "serving" a notice, in the absence of
G a deeming clause in the contract of the loan or the annexure to the charge; and

3. The effect of failure on the part of the chargee to notify the chargor of the date of the adjourned hearing was of such
H fundamental importance as to render an *ex parte* order a nullity.

[13] The above judgment was followed by Idris Yusoff J in *Wee Chye Luan, supra,* where again the notice of adjourned hearing was not served on the first respondent, the registered proprietor, in a
I charge action. The learned judge held that O. 83 r. 2(4) has not been complied with.

[14] In my view, the law contained in O. 83 r. 2(4) which has been clearly settled in the aforesaid three authorities is that where the notice of adjourned hearing had not been served on the defendant to a charge action, it constituted a contravention of the fundamental rule of natural justice i.e. audi alteram partem and so the order for sale granted thereby would be a nullity.

[15] It is pertinent to point out that the undisputed facts of the case before me reveal that the notice of adjourned hearing, as in the case of the notice of original hearing, has been served on both the defendants on 23 November 2004 at the first defendant's address, as both the defendants are relatives. Pursuant to the notice of original hearing, both the defendants have taken the above substantive steps to effect an amicable settlement with the plaintiff by way of the partial repayment of the sum of RM25,000 with an undertaking to effect payment of further instalments, which obviously the defendants have defaulted. They cannot now be heard to say that while they were aware of the notice of original hearing, they are however unaware of the notice of adjourned hearing. In my view, there has been no breach of the *audi alteram partem* rule.

[16] For the purpose of ascertaining whether the plaintiff has fulfilled the requirement of not less than two clear days under O. 83 r. 2(4), it is to be noted that there has been no dispute that the notice of adjourned hearing was dated 23 November 2003 and was sent by AR registered post. This service by post is expressly authorised by O. 10 r. 1(1). Under s. 12 of the Interpretation Acts 1948 and 1967, where a written law authorises postal service, then unless the contrary is proved, service shall be presumed to have been effected at the time when the letter (in this case, I would add, includes the said notice) would have been delivered, in the ordinary course of post. (See also *Pengkalen Concrete Sdn Bhd v. Chow Mooi (Guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor* [2003] 6 CLJ 326 per Suriyadi J).

[17] The defendants' submission did not explain how the non-fulfilment of the two clear days requirement had arisen.

[18] In my view, the reckoning of not less than "two clear days" under O. 83 r. 2(4) should be effected pursuant to O. 3 r. 2(3) which provides as follows:

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> Where the act is required to be done within or not less than a specified period before a specified period, the date ends immediately before that date.

[19] Hence, from 23 November 2003 to 26 November 2003, two clear days had elapsed, in which case, I hold that the plaintiff B has fulfilled the requirement under O. 83 r. 2(4).

Indorsement On The Outside Fold Of Affidavit

[20] It was argued for the defendants that the plaintiff claiming C delivery of possession of the land has not complied with O. 83 r. 2(3) by reason of the failure to indorse on the outside fold of the copy of the affidavit served on the defendant a notice informing the defendant to the effect. Support was sought in *Kimden Housing Development Sdn Bhd, supra.*

D

[21] The plaintiff responded that it was seeking an order for sale and so failure as alleged above is not fatal, citing, *inter alia*, O. 1A.

[22] My perusal of the plaintiff's originating summons leads me to the conclusion that the plaintiff was seeking an order for sale of E the land in order to recover the sum of RM225,905.90 as at 31 August 2003 and the words "delivery of possession" (or "penyerahan milikan") were never included in any of the prayers, in which case I am of the view that the submission advanced for the defendants is somewhat misconceived.

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[23] While it is true that in *Kimden Housing Development Sdn Bhd, supra,* James Foong J (now JCA) held that O. 83 r. 2(3) has not been complied with by the plaintiff whose originating summons therein has sought vacant possession, the position before me is G different in that the plaintiff's claim contains no corresponding prayer.

[24] The point raised for the defendants is highly technical. Rules of court provide for vehicles for the purposes of obtaining the necessary prayers according to the rights and obligations of the H parties under the law. These rules should not be rendered ineffective by highly technical objections.

[25] In *Bank Simpanan Nasional v. Abdul Mutalib Mohd Salleh* [2005] 7 CLJ 1 at p. 5, where the issue raised for the defendant I therein was highly technical in nature which has not occasioned a substantial miscarriage of justice, I invoked O. 1A which came into

force on 16 May 2002. Order 1A provides that in administering any of the rules herein, the court or a judge shall have regard to the justice of the case and not only to the technical non-compliance with any of the rules herein.

[26] Under O. 2 r. 3, a court or judge shall not allow any preliminary objection by any party to any cause, matter or proceedings only on the ground of non-compliance with any of the Rules of the High Court 1980 unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice: see also *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645 FC; *Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan* [2002] 3 CLJ 686 HC; *Megnaway Enterprise Sdn Bhd v. Soon Lian Hock* [2003] 5 CLJ 103 HC; *Terrance Simon Marbeck v. Kerajaan Malaysia* [2003] 6 CLJ 120 HC; and *Feedmeal Malaysia Sdn Bhd v. Teh Cho Yeow & Ors* [2003] 7 CLJ 11 HC.

Statement Of Accounts

[27] According to defendants' learned counsel, the plaintiff's affidavit in support has failed to comply with O. 83 r. 3(3), (6) and (7) in relation to the particulars thereunder ("the statutory particulars") and the interest claimed by the plaintiff was not in accordance with the charge and so the order should be set aside, along the line of authorities *viz Kimden Housing Development Sdn Bhd, supra; Citibank NA v. Ibrahim bin Othman* [1994] 1 MLJ 608 HC; *Bank Pertanian Malaysia v. Zainal Abidin bin Kassim & Anor* [1995] 2 MLJ 537 HC; *Overseas Union Bank (M) Bhd v. L & L Properties Sdn Bhd* [1999] 3 CLJ 47 HC; and *Hong Kong Bank (M) v. William Tan Enterprise Sdn Bhd* [1999] 3 MLJ 293 HC.

[28] The plaintiff contended that the statutory particulars have been provided and have led to the partial repayment by the defendants of RM25,000 for the purposes of an amicable settlement followed by their undertaking to repay further instalments. *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd* [2003] 3 CLJ 532 CA; and *Mokhtar bin Amin v. Mohamed Mokhtar bin Omar* [2001] 4 CLJ 489 CA were cited in support.

[29] In my judgment, this issue may be resolved by a careful consideration of O. 83 r. 3(3), (6) and (7) which are reproduced as follows:

A (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of:

B (a) the amount of the advance;

(b) the amount of the repayments;

(c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date
C of the affidavit; and

(d) the amount remaining due under the charge;

(4) …;

D (5) …;

(6) Where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).

E (7) Where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest.

[30] For this purpose, it is to be noted that in *Kimden Housing Development Sdn Bhd, supra*, the plaintiff's first affidavit stated the
F amount to be owing as at 25 April 1986 while the affidavit was affirmed on 30 June 1986. James Foong J (now JCA) held that it was in contravention of O. 83 r. 3(3)(c).

[31] In the same case, the plaintiffs' affidavits never stated "the
G amount of a day's interest" and so O. 83 r. 3(7) was not complied with. By reason of the above, and following *Malayan Banking Berhad v. Dagang Bina Sdn Bhd* [1991] 3 CLJ 1739; [1991] 1 CLJ (Rep) 678, the learned judge held that the defendant was deprived of the knowledge of the amount
H outstanding and interest due under the charge, which led to the setting aside of the order for sale.

[32] The judgment in *Kimden Housing Development Sdn Bhd, supra,* must be read in juxtaposition with that in *Citibank NA v. Ibrahim*
I *bin Othman, supra,* where the defendant claimed that the plaintiff had failed to provide the statutory particulars in the first affidavit in support of its application, *viz.*, the amount of the advance and

the rate at which interest had been calculated. Mahadev Shankar, J (later JCA) held, *inter alia*, that the plaintiff had applied for an order for sale in order to effect repayment of moneys secured by a charge and, on a reading of O. 83 rr. 1(1)(a), (b), (c), 3(3) and 3(6) together, it was incumbent on the plaintiff to provide the statutory particulars in the first affidavit. The plaintiff had failed to do so and the subsequent affidavits filed before the final hearing also did nothing to remedy the earlier inadequacies as the affidavits did not correctly state the amount of the advance nor show at what rate interest had been calculated. Hence, the plaintiff's application was dismissed. The learned judge however added at p. 615A-C as follows:

> It is a well-established rule of construction that unless the context specifically so excludes, words in the singular must include the plural. It is to be noted that O. 83 r. 3(3) gives the court the power to dispense with the statutory particulars 'in any case or class'. More than one affidavit can and is usually filed in this type of case because invariably the matter cannot be disposed of on the first return date (eg, for non-service) and at least one further affidavit is always required to state the total amount due on the date of the order.
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> Provided evidence of the correct amount due has been put before the final hearing, the court has the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice will thereby result to the defendant.

[33] The learned judge also rejected the contention that if all the statutory particulars are not contained in the very first affidavit filed in support of the originating summons, there is a "fundamental breach" as the concept of "fundamental breach" is one peculiar to non-performance of obligations which go to the root of a contract. The learned judge was not sure how appropriate it was in that context and did not think that *Kimden Housing Development Sdn Bhd, supra,* supported the proposition advanced for the defendant before his Lordship.

[34] Next, the plaintiff's affidavit in *Zainal Abidin bin Kassim, supra,* only stated the amount of interest and the total amount outstanding under the charge but did not provide any particulars on the amount of repayments and instalments in arrears. In dismissing the plaintiff's application for an order for sale, Mohd Hishamudin J held that there were serious omissions prejudicial to the defendants.

[35] In *L & L properties Sdn Bhd, supra,* Clement Skinner J held, *inter alia,* that the plaintiff's non-compliance with O. 83 r. 3(3) did not afford the defendant the opportunity to determine the exact sum to pay and the court could not with any measure of confidence say the total amount due to the plaintiff. That resulted in the dismissal of the plaintiff's application for an order for sale.

[36] A similar conclusion was arrived at by the learned judge in *William Tan Enterprise Sdn Bhd, supra,* where the plaintiff has not complied with O. 83 r. 3(3).

[37] Reverting to the facts before me, it is to be noted that the plaintiff's first affidavit in support stated in para 13 the amount of indebtedness as at 8 October 2003 was RM257,904.07, with further interest at 3.5% p.a. above the base lending rate of 6% p.a. calculated on a daily basis from 9 October 2003 to the date of realisation, as specified in the plaintiff's certificate of indebtedness. Para 3 of plaintiff's affidavit further stated that as at 26 November 2004 ie, the date the order for sale was made, the outstanding sum was RM261,932.70, as evidenced in the plaintiff's certificate of indebtedness.

[38] In my view, these certificates of indebtedness have special legal implications because the defendants have expressly agreed *vide* cl. 66 of the annexure to the charge that such certificates shall be binding and conclusive evidence against the defendants as chargors for whatever purpose including in a court of law: (see eg, *Citibank v. Ooi Boon Leong* [1981] 1 MLJ 282 per Raja Azlan Shah CJ (M) (now HRH Sultan of Perak)). Indeed, it could not be otherwise, as the defendants have not by their affidavit averred anything to the contrary at all.

[39] There can be no doubt that the plaintiff has put before the court the correct amount. The defendants have not shown any iota of prejudice at all. In the circumstances, I am more inclined to the view of Mahadev Shankar J in *Ibrahim bin Othman, supra,* to the effect that the court has the power to dispense with some omission to fulfil the rules to the letter.

[40] In *Chong Keat Realty Sdn Bhd, supra*, an order for sale has been made against the defendant. An application by the defendant to set aside the order for sale had been dismissed. On appeal, at p. 539 the Court of Appeal speaking through Gopal Sri Ram JCA:

1. rejected the defendant's only contention that the order for sale was invalid because the plaintiff's affidavit in support did not state the amount due as at the date on which the court was moved for an order for sale and has run foul of O. 83 r. 3;

2. declared as obiter the earlier decision of the same court in *Diamond Peak Sdn Bhd v. United Merchant Finance* [2003] 2 CLJ 8 in relation to the setting aside of an order for sale on ground of the chargee's failure to observe the mandatory requirements of O. 83 r. 3;

3. disallowed a litigant to be in a position to abuse a rule of court, oppress his opponent and thereby occasion an injustice;

4. reaffirmed the observations of the same court in *Mokhtar bin Amin v. Mohamed Moktar bin Omar, supra,* to the effect that:

   (1) a rule of court, like any other provision, may be the subject of an abuse and it is the function and duty of the courts to be ever vigilant against this; and

   (2) the modern approach towards procedural irregularities and the interpretation of what are usually considered to be mandatory or directory provisions is one of greater flexibility than that adopted heretofore; and

5. adopted the principle enunciated by Lord Woolf MR in *R v. Immigration Tribunal Ex parte Jeyeanthan* [1999] 3 All ER 231 that non-compliance with procedural requirements should not be treated as invalidating an action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice.

[41] This modern approach has found statutory expression in our O. 1A and O. 2 r. 3 as alluded to above and I would not risk any repetition here except to add that the defendants have at all time been acutely aware of the undisputed factual background including the outstanding sum and the interest as stated in the plaintiff's affidavits which have provided most of the essential statutory particulars, thereby occasioning no prejudice nor any substantial miscarriage of justice to the defendants.

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Conclusion

[42] For reasons abovestated, I am unable to find any merit in the defendants' application in encl. (17) which is hereby dismissed with costs.

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